

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ITC MIDWEST LLC, Petitioner, v. IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA, Respondent.	Case No. CVCV063439 RESPONSE TO MOTION TO REMAND OR DISMISS
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As ITC Midwest LLC (“ITC Midwest”) explained in its Petition, this case arises from an Iowa Utilities Board (“Board”) proceeding, Docket E-21340. In that docket, ITC Midwest sought an extension pursuant to Iowa Code § 478.13 (effectively a renewal of the term of the franchise). As the record of that docket shows, for over a year through a series of letters from Board staff to ITC Midwest and ITC Midwest’s responses, as well as through a technical conference, the Board took the position that ITC Midwest had to file for an amendment to its franchise before the Board would process the extension. ITC Midwest has consistently argued that such a requirement incorrectly interprets the law and creates an improper burden and undue uncertainty on the ability to modify facilities in ways that serve public policy and do not meet the statutory requirements that trigger a need for an amendment.

As the Board’s own Preanswer Motion for Remand of Dismissal (“Motion”) concedes, the Board’s March 11, 2022 order that is the subject of this appeal bears the unambiguous title, “Order Requiring Amendment to Electric Franchise.” The Board having spoken with finality on that issue, ITC Midwest properly and timely brought this appeal.

After the appeal was filed, however, and without seeking remand to restore its jurisdiction, the Board issued a subsequent order, the May 4, 2022 “Order Addressing Extension of Electric Transmission Line Franchise, Motion for Stay, and Amendment Requirements.” The Board misstates ITC Midwest’s position with regard to that Order. It is true that ITC Midwest filed with the Board a Motion to Reconsider asserting that, under *Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179 (Iowa 2013), the Board was divested of jurisdiction over the issue on appeal. ITC Midwest agrees with the Board that it could proceed to rule on the collateral issue – the extension of the franchise – which is conceptually separate.

Unfortunately, in that same Order the Board also reiterated the language that an amendment is appropriate on these facts. First, this greatly muddies the issue: there are two separate and separable issues: (a) the requested extension; and (b) the legal interpretation of whether an amendment is required under 199 IAC 11.6(1) where, as here, equipment has been added to an existing line that does not otherwise trigger the amendment requirement. The Board has blurred those issues as it purports to have granted the extension without an amendment requirement, even as it defended its reasoning for requiring an amendment (while ITC Midwest appreciates the granting of the extension, the ambiguity created in the process is a cloud over the result). Second, the Board was divested of its authority to issue rulings on the need for amendments in the docket at hand – that is not collateral and is in fact precisely the issue before the Court.

To the extent the Board argues that the appeal was premature, the May 4 Order demonstrates otherwise: while the Board changed its position on the collateral issue of the extension it merely repeated its March 11 holding regarding amendments, confirming that the Board considered the March 11 Order to be, in fact, “final” with regard to the agency’s treatment

of that discrete issue. Alternatively, to the extent the Board suggests its subsequent action resolves the appeal (that is, to the extent the argument suggests mootness), this is an issue capable of repetition, and also capable of avoiding review.¹ Moreover, where the alleged harm was voluntarily removed by the defendant, and can be voluntarily reinstated by the defendant, the “voluntary cessation” doctrine also is an exception to mootness.² Here, while the Board granted the extension and resolved the immediate harm, it still contends requiring an amendment is appropriate, and it could reinstate that requirement in the next case (ITC Midwest has other similar scenarios coming up in the near future, and MidAmerican Energy Company has a pending docket raising a nearly identical issue currently before the Board. *See* Board Docket No. E-21362.) The issue is certain to recur. As a result, the Court should, and can, address the legal issue involving amendments.

In the part of its motion seeking remand, the Board argues that a remand would provide time and opportunity for the Board and ITC Midwest to attempt to resolve the issues before the Court in any number of ways. And ITC Midwest agrees that would be useful and may ultimately get this matter off the Court’s docket. Generally, ITC Midwest believes that the proper process would have been for the Board to seek a remand before issuing its May 4 Order to ensure it had

¹ *See In re M.T.*, 625 N.W.2d 702, 704-05 (Iowa 2001) (“There is an exception to this general rule, however, ‘where matters of public importance are presented and the problem is likely to recur.’ Under these circumstances, our court has discretion to hear the appeal.”)

² While the “voluntary cessation” version of the “capable of repetition but avoiding review” doctrine has not been expressly adopted in Iowa, the Iowa Supreme Court recently “assumed, without deciding, that it exists,” *see Riley Drive Entertainment I, Inc. v. Reynolds*, 970 N.W.2d 289, 296-97 (Iowa 2022). In doing so, the Court cited favorably to the U.S. Supreme Court:

It is well settled that “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” “[I]f it did, the courts would be compelled to leave ‘[t]he defendant ... free to return to his old ways.’ ”

Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

jurisdiction. Unfortunately, the Board recently denied ITC Midwest's Motion to Reconsider, meaning that unless ITC Midwest files a new appeal as required by *Christensen*, there is no longer an active docket below, and the Board took away an obvious vehicle for such efforts to resolve the issue. In light of that change in the status of the case below, at this point **the better approach would be for the Court to retain jurisdiction and stay the procedural schedule (as it already has done) until the motion is ruled on, assuming the appeal is not dismissed, for 30 days after the ruling to give the parties time to explore settlement** if the Board genuinely seeks a mutual resolution to the issues implicated by the appeal.

What the Court should not do, however, is dismiss the appeal. The Board chose to create two issues – extension (as ITC Midwest sought) and amendment (which the Board asserted was a prerequisite), which are governed by two separate provisions of Chapter 11 of the Board's rules – and as the Board itself argues in paragraph 4 of its Motion they are collateral issues. The Board issued what has every indicium of a final order regarding amendments on March 11, 2022, an "Order Requiring Amendment to Electric Franchise," which order even set a required date for filing a request for such an amendment. The Board should not then be able, post-appeal, to rule on a collateral issue, the extension, and claim it now forecloses ITC Midwest's ability to seek review of the Board's legal conclusion on amendments. If the Board can simply issue new orders after appeals are filed that change the outcome but do not change the reasoning, issues like this can perpetually evade review, while denying parties of important clarity as to what the law in Iowa is for significant investments in electric transmission facilities.

In summary, there is no basis to dismiss the appeal. If the Board wants to act – and wants the Court to act -- like its March 11, 2022 Order doesn't exist, it can vacate the order. But as long as that order exists, it is a final agency action on the issue of amendment and was timely

appealed. And by repeating the same disputed language on amendments in its May 4 Order, there is no indication that the Board is vacating its final order on amendments. As for remand, ITC Midwest agrees that such an approach can be and has been used in Board cases in the past. It is, however, troubled by the denial of the reconsideration and concerned that remand may not fully protect ITC Midwest's rights in the appeal it has already perfected. ITC Midwest is willing to work with the Board as the Board's motion suggests, and to see if the Board will engage in the hinted-at "multiple possible agency proceedings." *See* Motion at ¶ 10. ITC Midwest's legitimate rights would be better protected, however, by the Court staying this case and maintaining jurisdiction, providing time for the parties to resolve the issue (in which case ITC Midwest would voluntarily dismiss the case) while ensuring that if such resolution does *not* occur that the Board has not deprived ITC Midwest of its rights under Iowa Code § 17A.19.

Filed this 8th day of July, 2022.

Respectfully submitted,

/s/ Bret A. Dublinske

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**ATTORNEYS FOR ITC MIDWEST
LLC**

CERTIFICATE OF SERVICE

The undersigned certifies the foregoing document was electronically filed with the Clerk of Court using the Electronic Document Management System (EDMS) on July 8, 2022, which will send a notice of electronic filing to all registered parties.

/s/ Bret A. Dublinske
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